NEWS BRIEF

UK class actions: back under the spotlight

A recent Court of Appeal decision has reignited the prospects of a £14 billion class action against Mastercard. In a much-anticipated ruling, the court has granted an appeal by Walter Merricks, the representative for over 46 million UK consumers, against Mastercard in relation to alleged overcharging of interbank fees between 1992 and 2008.

Taking a broad approach to class certification, the court found that class claimants need show only a "real prospect of success" to secure class certification and do not need to detail how the proposed economic model or damages distribution method would, in due course, be determined.

Background to the claim

In December 2007, the European Commission (the Commission) found that by setting default interbank fees (multilateral interchange fees or MIFs), Mastercard restricted price competition between the banks and breached EU competition law (*www.practicallaw.com/4-380-5174*). Mastercard's appeals to the European courts were unsuccessful (*www.practicallaw.com/6-520-0166*).

Commission decisions are treated across the EU member states as prima facie evidence of anti-competitive conduct in domestic follow-on actions for damages. Relying on the 2007 Commission decision, therefore, Mr Merricks commenced a UK follow-on class action in September 2016, seeking damages of over £14 billion for the allegedly inflated prices paid by approximately 46.2 million consumers for the partial or whole passing on of the unlawful MIFs.

Mr Merricks' collective action is "opt-out": that is, it is brought on behalf of everyone matching a certain description unless they expressly opt out of the proceedings. By contrast, "opt-in" class actions consist only of members matching the description who expressly elect to join the action (*see feature article "Class actions in England and Wales: key practical challenges", www.practicallaw.com/w-015-9333*). Despite these differences, both opt-out and opt-in claims must be:

- Brought by an appropriate authorised representative.
- Certified by the Competition Appeal Tribunal (CAT) as eligible for inclusion in collective proceedings.

"Certification" requires, among other things, that the claims are brought on behalf of an identifiable class of persons, raise common issues and are "suitable" to be brought in collective proceedings. If the CAT is satisfied that the conditions are met, it may make a collective proceedings order (CPO), thus allowing the claim to proceed to a full trial.

The CAT's decision

In July 2017, the CAT refused to grant Mr Merricks a CPO, for two principal reasons:

- The CAT was unconvinced that there was sufficient expert evidence to demonstrate the aggregate "pass-on" of MIFs from merchants to consumers, so as to justify the aggregate damages claimed.
- Mr Merricks' proposed method of distributing damages would not correlate to each individual's loss, thus contradicting the compensatory principle of damages for torts under English law (*www.practicallaw.com/w-010-0391*).

Court of Appeal decision

The court considered the two points in turn.

Pass-on. The court said that a proposed class representative need demonstrate only that a claim has a "real prospect of success" at the certification stage. In addition, the court endorsed "top-down" calculations of aggregate damages, holding that to insist on proof of individual losses would run counter to the provisions of the UK regime. Applied to the case, Mr Merricks only needed to convince the CAT that both:

- The expert methodology concerning pass-on of MIFs to consumers was "capable" of assessing the level of pass-on.
- The data to operate that methodology would, or would likely, exist at trial.

Mr Merricks did not need to produce or identify all of the relevant evidence. The court held that an analysis of pass-on to consumers on an individual basis is unnecessary when what is claimed is an aggregate award, and pass-on to consumers generally satisfies the test of commonality of issue necessary for certification. Nor did the certification stage require a mini trial, which was more or less what occurred before the CAT, which the court held had demanded too much of Mr Merricks for that stage of the case.

Distribution of damages. The court found that, while distribution of damages according to what an individual claimant has lost will probably be the most obvious and suitable distribution method in cases where each individual's loss is readily calculable, it is not mandatory under the applicable legislation. If such a prerequisite did exist, then the power to make an aggregate award would be largely negated in class actions of this kind.

As the CAT clearly did consider that an aggregate award had to be distributed to claimants so as to restore individual loss suffered by them, the CAT's approach was both premature and wrong.

Comment

The court's judgment appears to lower significantly the initial threshold for class actions to proceed through the certification stage. No opt-out claim has yet been certified, but with a low bar, and in a climate where the subject matter for anti-competitive behaviour continues to be widened by the Competition and Markets Authority, there may follow a noticeable uptick in class action litigation.

Certification as a continuing process. The court's judgment endorsed the idea that certification is a "continuing process", noting that a class action might be terminated once the pleadings, disclosure and expert evidence are complete and that the court is dealing with reality rather than conjecture.

In practice, however, this may provide cold comfort to parties given the pleadings,

disclosure and expert evidence stages in litigation often incur significant time and cost. Class representatives and their funders should also take note of the potentially significant liability to pay adverse costs if the CPO is revoked after completing such expensive steps in the process.

Compensatory principle. By allowing a distribution of damages that does not correspond to each individual's loss, the court departs from the compensatory principle of damages for torts under English law, creating novel ground for the English courts and practitioners alike, and uncertainty as to how the regime might develop.

Third-party funding. The court specifically noted that the revised class action regime was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding. This highlights the increasingly welcoming approach of the English courts and Parliament towards third-party funding, the market for which has grown significantly in recent years, with the capital currently available for funding estimated at over £1.3 billion. Third-party funding is a particularly valuable avenue for UK consumers, given that opt-out class actions cannot be funded by arrangements whereby lawyers receive a portion of any damages received.

Looking ahead

Subject to the outcome of an anticipated appeal to the Supreme Court, the case will now return to the CAT, which will decide whether to certify the class action and, if so, ultimately whether Mastercard is liable to pay any damages.

On a number of fronts, the court's judgment provides, at least temporarily, some much-needed clarification. Given the infancy of the UK class action regime, this clarity should be welcomed while also expecting further twists and turns. Indeed, the CAT has already delayed the certification hearing of the trucks cartel until after the anticipated Mastercard appeal has concluded (and December 2019 at the earliest), given that the subject matter is fundamental to the legal test for the CPO regime. Certification hearings are also currently scheduled for November 2019 for claims that train operators double-charged London Travelcard-holders. These hearings would see the first application of court's favoured approach.

In the first opt-out case to go before the CAT, it commented about the process that "everyone is learning on the way". For the moment at least, this still seems apposite.

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